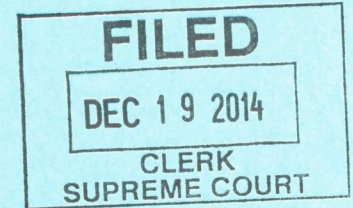


COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
DOCKET NUMBER: 2014-SC-000536



WEBSTER COUNTY COAL, LLC  
(DOTIKI MINE)

APPELLANT

VS. COURT OF APPEALS  
DOCKET NUMBER: 2013-CA-001968-WC  
WCB NUMBER: 09-99663

MARSHALL PARKER, ET AL.

APPELLEES

\*\*\*\*\*

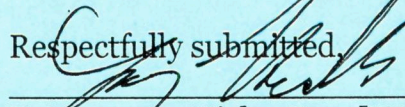
**RESPONSE BRIEF OF APPELLEE, MARSHALL PARKER**

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copies of the foregoing was sent by overnight mail to the Clerk of Supreme Court of Kentucky, Capital Bldg., Room 235, 700 Capital Ave., Frankfort, KY 40601 and copies were served by Priority US mail, to Kentucky Court of Appeals, Sam Givens, Clerk, 360 Democrat Drive, Frankfort, KY 40601- 9229, Hon. Steven G. Bolton, ALJ, Department of Workers' Claims, 657 Chamberlin Avenue, Frankfort, Kentucky 40601; Workers' Compensation Board, Office of Workers' Claims, Prevention Park 657 Chamberlin Avenue, Frankfort, KY, 40601, Office of the Attorney General, 700 Capitol Avenue, Suite 118, Frankfort, Kentucky 40601-3449; and Stanley S. Dawson, Esq., Fulton & Devlin, LLC, 1315 Herr Lane, Suite 210, Louisville, KY 40222, John Morton, Esq., PO Box 883, Henderson, KY 42419; Deaconess Hospital, 600 Mary St., Evansville, IN 47747; Deaconess Health System, P.O. Box 1230, Evansville, IN 47706-1230; Neurosurgical Consultants, 520 Mary St., Suite 470, Evansville, IN 47710; David D. Eggers, M.D., 520 Mary St., Suite 470, Evansville, IN 47710; Center for Orthopaedic Services, 44 McCoy Avenue, Madisonville, Kentucky 42431; James M. Donley, M.D., 44 McCoy Avenue, Madisonville, Kentucky 42431; Center for Orthopaedics, PO Box 280, Madisonville, KY 42431; Wayne C. Cole, DO, PO Box 310, Providence, KY 42450; Kelly L. Cole, DO, P.O. Box 310, Providence, KY 42450, this 18 day of December 2014.

Respectfully submitted,

  
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## **INTRODUCTION**

This is a workers compensation case. The employer is making a “substantial evidence” challenge to the ALJ’s determination that Mr. Parker’s back injury is related to his fall at work.

## **STATEMENT CONCERNING ORAL ARGUMENT**

Appellee believes that oral argument would not assist the Court in deciding the issues presented.

**COUNTERSTATEMENT OF POINTS AND AUTHORITIES**

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## COUNTERSTATEMENT OF THE CASE

Marshall Parker fell from a coal conveyor on September 8, 2008, while working for Webster County Coal, injuring his knee and back.<sup>1</sup> Mr. Parker had been working for this employer since 1974. At the time of the injury, Mr. Parker was a month away from being 69 years old but was still working more than 70 hours per week on average.<sup>2</sup>

Mr. Parker filed a workers compensation claim for injury to his knee and back. The knee claim proceeded without controversy but the back claim was denied, first on notice and then on causation. The Employer did not challenge the impairment rating for Mr. Parker because it was the rating determined by the Employer's expert, Dr. Gavigan. Ultimately Mr. Parker had surgery for his back issues<sup>3</sup> and the matter was heard before an ALJ.

At the hearing, Mr. Parker testified that he had pain immediately after the injury but thought it would go away. Then the next day he had such pain down his leg and into his right foot that he could hardly walk.<sup>4</sup> Mr. Parker testified that he had some previous back problems while working in the mines but had never missed any time from work due to any of these injuries and had never had any ongoing treatment.<sup>5</sup> At the time of his September 8, 2008 work related injury, Mr. Parker had been working an average more than 70 hours a week at the mines.<sup>6</sup>

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<sup>1</sup> Hearing transcript, page 10.

<sup>2</sup> Id at 19-21.

<sup>3</sup> Id at 24.

<sup>4</sup> Id at 10.

<sup>5</sup> Id at 21.

<sup>6</sup> Id at 19-20.

The Defendant Employer submitted the records of Tri State Orthopaedics which documented some minor episodes of back pain prior to the September 2008 injury but also documented that Mr. Parker was fine as of June 26, 2006, when he was returned to work without restrictions and noted to be “doing really well. No further treatment is needed from my perspective.”<sup>7</sup>

The employer also filed two IME reports from Dr. Travis. The first IME report, dated October 9, 2009, stated that the low back injury was related to the September 8, 2008 work injury. But then the Employer filed a second report from Dr. Travis dated November 20, 2009. Plaintiff submitted two Form 107 reports from Dr. David Eggers, the surgeon who actually performed Mr. Parker’s fusion and decompression of the L3-4. Dr. Eggers noted the injury to be work related but did not give an impairment rating because he wanted to send Mr. Parker to a functional capacity evaluation first. (Plaintiff ultimately relied upon the impairment rating submitted by defense counsel.)

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<sup>7</sup> Employer’s January 9, 2012 submission of records of Tri-State Orthopedics, June 23, 2006 office note.

## **ARGUMENT**

### **I. Standard of Review**

The ALJ's decision as finder of fact must be upheld unless the decision was not supported by substantial evidence. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984). An ALJ may draw reasonable inferences from the evidence and believe or reject evidence or parts thereof at his discretion. *Jackson v. General Refractories Company*, 581 S.W.2d 10 (Ky. 1979).

The ALJ's role as fact finder prevents an appellate court from using its own discretion with regard to weight and credibility of the evidence. *Whitaker v. Rowland*, 998 S.W.2d 479 (Ky. 1999).

### **II. Issues Raised**

The Employer contends that the ALJ's decision concerning causation of Mr. Parker's back injury was not based upon substantial evidence. In the Opinion and Award, the ALJ specifically states that Dr. Eggers' form 107 report is one of the bases for the award. Dr. Eggers' report indicates that Mr. Parker was referred to him by Dr. Donley on May 20, 2009 for "evaluation of primarily back and right leg numbness." It then notes that the injury was work related in the "Causation" section of the report.<sup>8</sup>

The Employer's "substantial evidence" argument seems to be that Dr. Eggers did not know what his patient's medical history was and that he in fact was confused as to whether or not his most recent injury was 2005 or 2008.

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<sup>8</sup> Form 107 submitted by Plaintiff and received into the record on July 16, 2012.



This is based on a tortured, partial reading of the medical history section of Dr. Eggers' Form 107.

When the medical history section is read as a whole, including the notation that Mr. Parker's current treatment with Dr. Eggers was due to a referral from Dr. Donley in 2009, it becomes clear that Dr. Eggers was aware that this was for a new problem. The medical history was merely noting the occasions upon which Mr. Parker had come to Dr. Eggers, once in 2005 for a cervical problem and then in 2009 after a referral from Dr. Donley because of some noted radiculopathy concerning the low back. This was clearly not meant to indicate that Dr. Eggers felt that both of these conditions, separated by 4 years, were due to the same event.

In addition, the request for the form 107 specifically notes that the requested opinions are concerning a work injury on September 8, 2008. The letter requesting the report was entered into the record along with the form 107 filed by Mr. Parker on September 30, 2011.<sup>9</sup> In that first form 107, Dr. Eggers states that he can't complete the form 107 until December 2, 2011 because surgery was too recent. He ultimately completed the form 107, establishing causation and the form was filed into the record.

The Employer also fails to consider that its own expert opined that the back injury was due to the work accident. Dr. Travis submitted a 16 page, detailed report including a Narrative Medical History, Past Medical History, Social History, Family History, General Physical and Neurological Examination

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<sup>9</sup> Form 107 submitted by Plaintiff with accompanying documents, received into the record on Sept 30, 2011.



and a Review of Medical Records section. He ultimately concluded that Mr. Parker needed back surgery and that it was causally related to the September 8, 2008 work injury.<sup>10</sup>

Dr. Travis did submit an Addendum to his first report. In it he changed his mind and found that the back injury was not related to the work accident. On pages one and four he notes that the Employer's nurse sent him some additional records, asking him to review and see if they changed his mind on causation. He stated that they did and referenced a note from Dr. Donley dated October 23, 2008.<sup>11</sup> But this record was not new to Dr. Travis; it was summarized in his first report in which he found causation. It appears that he reviewed the evidence and found causation, but when asked again, he concluded the same evidence led to a new opinion.

Mr. Parker's testimony was also a factor in the ALJ's determination of causation. Mr. Parker was working 70 hours per week in the mines, had missed no work and had no treatment for any back pain in more than two years prior to the accident. And in that last doctor visit prior to the work accident, he was discharged without restrictions and without any need for a follow up visit. None of these things are likely if Mr. Parker had an active condition in his back.

And finally, issues concerning credibility of the evidence are within the purview of the ALJ and may not be set aside if it is reasonable. *Whitaker v. Rowland*, 998 S.W.2d 479 (Ky. 1999). Though the ALJ's determination

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<sup>10</sup> Dr. Travis first report dated October 9, 2009.

<sup>11</sup> Dr. Travis refers to the note's date as October 23, 2008 but seems to mean October 22, 2008, as referenced in the body of his report.

regarding the credibility of Dr. Eggers' report only has to be reasonable, it is actually the more plausible of the two possible views and should be upheld.

### **CONCLUSION**

Because the ALJ's decision is supported by substantial evidence, the ALJ's decision regarding the causation of the back injury should be upheld.

Respectfully submitted,



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